Supreme Court, U.S.
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No. 97-1718

In The

Supreme Court of the United States

October Term, 1997

MARILYN MOSS,

Petitioner,

vs.

PEGGY GARRITY, PEGGY GARRITY, A CORPORATION, DOUGLAS BENEDON, GERALD SERLIN AND BENEDON & SERLIN, A PARTNERSHIP,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

REPLY TO BENEDON BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER OR NOT A 45% ATTORNEY FEE CONTINGENCY FEE CONTRACT VIOLATES THE FOURTEENTH AMENDMENT IN VIEW OF CALIFORNIA'S BUSINESS & PROFESSIONS CODE SECT. 6146(A) WHICH PUTS A CEILING ON CONTINGENCY FEES AS TO ONE CLASS OF CITIZENS.

II. WHETHER OR NOT AN ATTORNEY CONTINGENCY FEE CONTRACT IN A U.S. DISTRICT COURT FEDERAL QUESTION CASE IS A FEDERAL CONTRACT OR A STATE CONTRACT.

III. WHETHER OR NOT THE CONFLICTING 10TH CIRCUIT CASE OF *JOOS v. INTERMOUNTAIN HEALTH CARE* WHICH HOLDS THAT STATE COURTS CAN LITIGATE FEDERAL COURT CASE CONTINGENCY FEES IS AT ODDS WITH 9TH CIRCUIT CASE OF *PALOMAS LAND AND CATTLE v. BALDWIN* WHICH HOLDS THAT FEDERAL COURTS ARE THE SOLE FORUM TO DECIDE ATTORNEY FEE AWARDS IN FEDERAL CASES.

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I. RESPONDENT BENEDON MISSTATES THE CASE.

COMES NOW Petitioner Marilyn Moss and objects to the misleading statements presented to this Honorable Court by the Benedon Respondents.

A. This case addresses Public Policy Issue of Excessive Attorney Contingency Fees.

Contrary to Respondent Benedon's assertions, this case is an opportunity for this Honorable Court to make life better for thousands of injured U.S. Citizens. If this Court will address the unequal treatment of injured citizens in California by unscrupulous attorneys, it will help all United States citizens. If any state has statutes which regulate contingency fees, then all citizens should benefit, not only a select few. Any citizen in the United States could be the victim of personal injury and as soon as that happens, that person is at the mercy of tort lawyers. Attorneys should be regulated so that the legitimately injured client is awarded a proper personal injury recovery to make him or her whole. As it is now in California, the only people benefiting from the civil court system are the attorneys and medical malpractice victims. All the rest of the citizens are not protected from being charged excessive and unconscionable contingency fees. Petitioner prays this Honorable Court will grant her Petition in this case.

B. Petitioner has Properly Invoked Jurisdiction of this Court.

In their Opposition, Benedon's assertion that Petitioner has failed to invoke Supreme Court Jurisdiction is not correct. At page 4 of the Opposition Brief, Respondent Benedon sets forth Supreme Court Rule 10(b) which states: "[Petition for Certiorari] may be granted when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." Above that quotation on the same page 4, Respondent Benedon answers his own charge when he states "The [state] trial court found Petitioner's argument that a fee dispute arising from representation in a Federal Court matter had to be litigated in a Federal Court to be without merit." That is one of the federal issues that needs to be addressed by this Honorable Court. A contingency fee contract which subject matter is the Federal Court Judgment should be decided by the Federal Court Judge who presided over the case. In this matter, the California Court of Appeal is saying it is okay for the California Courts to re-litigate and re-distribute Federal Court Judgments by way of contingency fee contracts. That is the problem. If an attorney/fee contract is for hourly fees, that is one thing. An attorney fee contract, which subject is a Federal Court Judgment, is something else entirely. If the state court re-distributes the Federal Court Judgment, then the injured party may end up with nothing. It does not make sense for an injured person to litigate and go to jury trial in Federal Court only to have State Court re-distribute and destroy the Federal Court Judgment by giving it all to the attorneys.

Contrary to purported factual statements made by Respondent Benedon in his Opposition, Petitioner did pay a 45% contingency attorney fee in the sum of $1,350,000 to her attorney in the *Moss v. Santa Fe Railroad* CV89-5909KN(Ex) Federal Question lawsuit. In his Opposition, Benedon's false statement that Petitioner "failed to pay attorneys" could not be further from the truth and is an unprofessional mischaracterization before this Honorable Court.

Further, Benedon says that the Moss-Garrity and Moss-Burton contingency attorney fee contracts were state contracts. That, too, is false. The subject matter of a contingency attorney fee contract in a U.S. District Court case is a percentage of the Federal Judgment. The United States Congress did not draft the Federal Rules of Civil Procedure so attorneys practicing in U.S. District Courts could go over to State Court and file their attorney fee petitions. The intent of the Congress is that Federal Judges control the attorneys who practice in their Courts.

The Petition cites Federal Rules of Civil Procedure 54(d) and Local Rule in the Central District 16.10 and of course, the conflict between the 9th Circuit case of *Palomas Land & Cattle v. Baldwin*, 189 F.2d 936 (1951) and the 10th Circuit Court case the California Court of Appeal relied on, which is *Joos v. Intermountain Health Care, Inc.*, 25 F.3d 915 (10th Cir. 1994).

Also of note is the case of *Venegas v. Mitchell*, 495 U.S. 82 (1990) wherein this Honorable Court ruled that the correct procedure for filing contingent fee attorney fee claims in U.S. District Court when there were more than one set of attorneys in the case was for the attorney to file

a motion as a permissive intervener after the case has concluded. That was also the correct procedure which should have been used by the attorneys in the *Moss v. Santa Fe Railroad* federal court case. Garrity and the first attorneys Burton and Huerta should have filed their fee petitions and Federal Court Judge Kenyon could have decided what fees should be paid to whom.

Instead, Garrity did not get approval from anyone – she just put the $3 million dollar check in her trust account and kept $1,350,000 in cash for herself. Then, the first attorneys filed their contingency fee claim against the Federal Court Judgment in State Court. Rhetorically, how could a State Court Judge know what work was done and by whom in a Federal Court case and why would the State Court Judge have jurisdiction to re-distribute funds of a Federal Court Judgment? The purpose of tort law is to make the injured party whole again. If Federal Court attorneys go into state court and end up with the entire $3 million dollar Federal Court Judgment, then the civil court system does not work. The intent of the United States Congress as codified in the Federal Rules of Civil Procedure is that attorney fees in a Federal Question case be decided in U.S. District Court. To say that an attorney/client contract which subject is a percentage of the Federal Court Judgment is a "state contract" to be litigated in "state court" is both legally wrong and defies common sense.

C. The Case Was Correctly Stated By Petitioner.

The Benedon Respondents' version of the facts is not supported by the record. First, Benedon says Petitioner

"hired and fired" four sets of attorneys. That is untrue. As supported by the record, the first attorneys in the *Moss v. Santa Fe Railroad* Federal Court case, John Burton and John Huerta, abandoned the case. Their abandonment of the case and their statements to Petitioner that the *Moss v. Santa Fe Railroad* case was worthless operated as a rescission of the contract and it extinguished their rights to any fees. Peggy Garrity was not fired. Garrity conducted the trial in the *Moss v. Santa Fe Railroad* lawsuit, collected her $1,350,000 in cash and abandoned the frivolous legal malpractice case she created in October, 1992. Attorney Henry J. Walsh was not fired. He was hired to file one motion to vacate. He filed the one motion and his job was finished. And finally, Benedon & Serlin was not fired. They were hired to prepare an appeal and were paid over $23,000 for it, which was excessive considering the incompetent job they did. The upshot of this entire matter is that after the *Moss v. Santa Fe Railroad* lawsuit was removed to Federal Court under the Employee Retirement Income Security Act of 1974 and F.R.C.P. 81(c), state court had no further jurisdiction over the matter and no right to re-distribute the Federal Judgment as has occurred in this case.

Petitioner prays this United States Supreme Court will grant her Petition For Writ of Certiorari based on the information in this Reply Brief and her Petition.

DATED: June 1, 1998

Respectfully submitted,

MARILYN MOSS
Petitioner